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In the Supreme Court of the United States

OCTOBER TERM, 1963

SEYMOUR KOMITOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1447

SEYMOUR KOMITOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1968. A petition for rehearing was denied on April 22, 1968. The petition for a writ of certio-

rari was filed on May 20, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 32(d), F. R. Crim. P. provides:

> *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying petitioner's motion, made after sentencing, to withdraw his plea of guilty.

2. Whether the attorney who represented petitioner at the time he entered his plea had furnished him ineffective assistance.

STATEMENT

A nine-count indictment returned in the United States District Court for the Southern District of New York charged that petitioner, while an officer of the Internal Revenue Service, had violated 26 U.S.C. 7214(a)(2) by unlawfully receiving compensation "for the performance of a duty, to wit, the examination of income tax returns hereinafter set forth." The indictment then listed the approximate dates upon which monies had been received, the individuals who made the payments, the taxpayers for whom the pay-

ments had been made, and the amounts. Count 5 charged that between June 20 and July 5, 1961, petitioner was given $15 by Sol Myers, in connection with the 1960 tax return of Louis and Dorothy Simon. The remaining counts charged four other payments by Myers, of $20 or $25, and four from Albert M. Goldstein, each of $50, for various taxpayers. In response to a bill of particulars, the government declared that the payments had been made during business hours at the Internal Revenue Service office in New York City.

Initially, petitioner entered a plea of not guilty to all nine counts. On May 9, 1967, he withdrew his plea as to count 5 and entered a plea of guilty. Following an inquiry into the voluntariness and knowing nature of the guilty plea (R-93-99, 108-114),[1] it was accepted. On July 14, 1967, petitioner was sentenced to imprisonment for six months, probation for two years, and a committed fine of $2500.

Four days later, petitioner filed with the sentencing court a motion for reconsideration and reduction of his sentence. In a memorandum supporting the motion, petitioner's retained counsel urged the court to give greater consideration to the fact that petitioner was an attorney, and had cooperated with the federal authorities (R. 63, 64):

> Prior to his deciding to plead guilty he had represented himself through his partner, Maurice W. Spiegel. It was subsequent thereto that he retained his present attorney, Jacob P. Lefkowitz, that he, after due and comprehensive discussions

[1] "R." refers to the record in the court of appeals, which has been filed with the Clerk of this Court.

> with his present counsel and Mr. Andrew Maloney, Assistant United States Attorney of the Southern District of New York, decided to fully cooperate with the United States Authorities completely and thoroughly.
>
> * * * *
>
> No one will derive any benefit from the incarceration of Petitioner. No one will be endangered by continuing Petitioner at liberty among society. In fact, Petitioner has not gone unpunished and is not of such low mentality that he has not been aware of his transgression.

At the end of the pleading petitioner placed his signature under an acknowledgment that he "has read the same and that the statements therein are true" (R. 65). In a memorandum filed on July 20, counsel professed that "up to the present time, Petitioner has had an opportunity to fully digest and understand the nature of the transgression which he committed" (R. 69). On July 27, 1967, petitioner's motion was granted to the extent that he was made eligible for parole "at such time as the Parole Board may determine." The court further commented, "This will be done because of the defendant's status as a lawyer and the serious sanctions which will probably confront him in his professional capacity" (R. 71).

On the same day that petitioner had filed his second memorandum in support of a reduction in sentence, he retained his present counsel. The next day, July 21, petitioner filed a motion under Rule 32(d), F. R. Crim. P., to withdraw his guilty plea. He alleged that he was unaware that the statute was violated only if the money he received was for the perform-

ance of an official duty. Petitioner claimed that the $15 received from Myers was not for the performance of a duty, but rather "in a purely social friendship context one day when it happened to be my birthday and Mr. Myers and I were talking over a legal problem in connection with an alien tax treaty, a field of law in which I happen to have special knowledge, and on which I had given Mr. Myers some advice, not in connection with any tax case that I was auditing as an Internal Revenue officer" (R. 76). Petitioner also averred that the gift from Myers was made after business hours on the street; that he did not understand the statutory requirements until after conferring with present counsel, Mr. Lewis; and that he was innocent of the eight withdrawn counts, in that he never received any of the money mentioned therein (R. 76-77).

At a hearing on the motion, Mr. Lewis charged that petitioner's prior counsel, Mr. Lefkowitz, had misinterpreted the applicable law by telling petitioner that he was guilty if he had accepted a gift from anyone doing business with the Internal Revenue Service, even though it had nothing to do with the charge in the indictment. Mr. Lewis asserted that petitioner relied upon this advice in pleading guilty, and that nothing occurred in the hearing at which his plea was accepted to indicate that the advice relied upon was incorrect (H. 9-10).[2] Mr. Lewis also advised that court that Mr. Lefkowitz had represented Albert M.

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[2] "H." refers to the transcript of the hearing on the motion to withdraw petitioner's guilty plea, which has been filed with the Clerk of this Court.

Goldstein, who had been named in the indictment as the donor of the monies involved in withdrawn counts 6-9; that when petitioner discussed his case with Mr. Lefkowitz, the latter advised him of his representation of Goldstein and that he could not try his case, but would take it as far as the plea. Mr. Lefkowitz then assured petitioner that he would receive a suspended sentence, with no threat of publicity or disciplinary hearings (H. 6-7). Mr. Lewis further charged that Mr. Lefkowitz had urged petitioner to drop a $250,000 slander suit against Goldstein (H. 11).

Government counsel pointed out that, in view of the record, it was incredible that petitioner, a lawyer, had not acted knowingly when he pleaded guilty. With regard to the claim of conflict of interest, counsel noted the lack of any prior allegation or supporting affidavit by Mr. Lefkowitz (H. 18-24). Following this argument, the court determined that there was no merit to any claim of conflict of interest because petitioner was fully aware of Mr. Lefkowitz's representation of Goldstein, and because petitioner was not prejudiced thereby, especially in view of the fact that Goldstein was not involved in count 5 (H. 28-29). As to the voluntariness and knowing nature of the guilty plea, the court indicated its disbelief in petitioner's claim. It stated that, following the discussion with petitioner at the time the plea was entered, "I was satisfied at the time that he knew what he was doing and nothing that has been said since satisfies me that it was any different; and under the circumstances, I deny the motion" (H. 33-39). The court of appeals affirmed in a *per curiam* opinion (Pet. App. 1-5).

ARGUMENT

1. As correctly stated by the court of appeals (Pet. App. 3), permission to withdraw a guilty plea after sentencing is a matter for the sound discretion of the trial court, and denial of that permission is reversible only if clearly erroneous. *United States* v. *Giuliano*, 348 F. 2d 217 (C.A. 2), certiorari denied, 382 U.S. 939; *Smith* v. *United States*, 324 F. 2d 436 (C.A. D.C.), certiorari denied, 376 U.S. 957. Nothing in the record warrants a finding that the court which accepted the guilty plea abused its discretion in refusing to allow its withdrawal. Petitioner, an experienced attorney, pointed out in his own affidavit that he "is not of such low mentality that he has not been aware of his transgression." He does not claim to have misunderstood the meaning of any words in the indictment.[3] That indictment charged, in pertinent part, that he violated the statute by receiving money from Myers "for the performance of a duty, to wit, the examination of income tax returns * * *." It is inconceivable that he failed to understand and that two other attorneys who worked on his behalf before sentencing failed to convey to him the simple import of the offense with which he was charged.

Moreover, the record discloses a number of instances prior to sentencing where petitioner's awareness of the nature of his offense was manifested. At

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[3] Petitioner had a copy of the indictment nine months before his guilty plea was entered (R. 91), leading the court below to conclude that "[t]he plea was not made in haste" but with a full understanding of all the pertinent information (Pet. App. 4).

a hearing on petitioner's motion for discovery, government counsel mistakenly stated that petitioner was charged with bribery. Both the court and defense counsel corrected him, declaring that petitioner was charged not with bribery but with unlawful acceptance of fees for the performance of duties. At the subsequent hearing during which petitioner entered his guilty plea, the following colloquy ensued between the court and petitioner (R. 95-96):

Q. Mr. Komitor, would you mind telling me a little about what happened here? How did this come about?

A. Well, your Honor, I was working in the Internal Revenue and there are many people that I dealt with, various accountants and taxpayers, and on the occasion of this charge one of the accountants with whom I had been handling—for whom I had been handling a tax matter gave me a gift of $15.00 because—he said it was because he wished to give me a gift.

Q. You are talking about Sol Myers?

A. Yes, your Honor.

Q. And you knew, of course, at that time as an employee that you had no right to accept a gift from him?

A. I did, your Honor.

Q. You knew you were doing something wrong?

A. Yes, sir.

At petitioner's sentencing hearing, Mr. Lefkowitz stated (R. 120):

> Here is a man who pleaded guilty and was convicted of the crime of accepting a gratuity for doing something which he was getting a salary

for and his job was to perform that duty, and it is against the law to accept such a gratuity.

Two days after sentencing, petitioner averred through counsel that he had had "an opportunity to fully digest and understand the nature of the transgression which he committed" (R. 69). Under these circumstances, and in view of the specific language in count 5 of the indictment, a post-sentencing claim that petitioner was not aware that the money he accepted from Sol Myers had of necessity to be related to the performance of duties as an Internal Revenue Service employee for the charge to stand strains credibility.

2. Petitioner's reliance on the fact that certiorari was granted by this Court in *McCarthy* v. *United States*, No. 1209, this Term, on April 29, 1968, is misplaced.[4] That case involved a refusal to vacate the defendant's sentence under Rule 11 even though defendant had made a statement to the trial judge which, he now claims, required further inquiry into the element of specific intent, thereby affecting the knowing nature of the plea. Whether or not the contention in that case is tenable, it has no bearing upon a situation such as the one in the instant case. Here the claim arises solely under Rule 32, and petitioner simply has failed to carry his burden of establishing "manifest injustice" and has shown no abuse of discretion in the trial court's denial of his post-sentencing motion to withdraw his guilty plea. Here the

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[4] The decision of the court of appeals in *McCarthy* is reported *sub nom. United States* v. *McCarthy*, 387 F.2d 838 (C.A. 7).

trial court thoroughly explored petitioner's understanding of the charge against him before accepting his plea (see Pet. App. 4-5). Accordingly, the pendency of the *McCarthy* case provides no reason for granting certiorari in the instant case.

3. At the hearing on petitioner's motion to withdraw his guilty plea, Mr. Lewis, for the first time, raised a claim of ineffective assistance of prior counsel, Mr. Lefkowitz. The belated claim was founded upon allegations that Mr. Lefkowitz did not furnish his undivided loyalty to petitioner since he also represented Albert Goldstein, who had been named in four counts as the donor of money to petitioner. From the time he first retained Mr. Lefkowitz, however, petitioner was aware of the relationship between the attorney and Goldstein. The attorney's relationship with Goldstein in no way conflicted with petitioner's interests, in view of the fact that all of the counts naming Goldstein were dismissed and Goldstein's name was not shown to be instrumental in petitioner's decision to plead guilty to one of the nine counts against him. The record further discloses a strong case against petitioner unrelated to any matters involving Goldstein. Petitioner can thus point to nothing in the record relating to Mr. Lefkowitz's relationship with Goldstein which could properly be viewed as constituting "manifest injustice" necessitating reversal of the decisions of the courts below. See *Hayman* v. *United States*, 205 F. 2d 891 (C.A. 9), certiorari denied, 346 U.S. 860.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1968.

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